Supreme Court, U.S.
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No. 02-136

IN THE

Supreme Court of the United States

Four Pillars Enterprise Co., Ltd., Pin Yen Yang, and Hwei Chen Yang,

Petitioners,

v.

United States of America.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Petitioners and respondent agree that "this Court's resolution of the question presented in" No. 01-1184, *United States* v. *Recio* (argued Nov. 12, 2002), "could have a bearing on" the question presented by the petition for certiorari. Br. for U.S. 7. The petition therefore "should be held pending this Court's decision in [*Recio*], and then disposed of accordingly." *Id.* 8. Nonetheless, because the Brief of the United States misapprehends the full scope of the relationship between this case and *Recio*, a short Reply is in order.

As the petition explains, "petitioners were convicted of attempting to steal and conspiring to steal a trade secret relating to a product in interstate commerce." Pet. i. The question presented is "whether petitioners' belief that they were receiving an actual trade secret is a sufficient basis for their convictions." *Id.* This Court's decision in *Recio* may implicate that question in two separate respects.

First, this Court may affirm the Ninth Circuit's holding in *Recio* that legal impossibility is a defense to a charge of conspiracy. That holding would contradict the Sixth Circuit's ruling in this case (see Pet. App. 7a-11a) that impossibility is not a defense to inchoate crimes. The case would then appropriately be remanded to permit the court of appeals to reconsider the validity of petitioners' convictions. See Pet. 8-9. The United States agrees. See Br. for U.S. 7.

Second, the United States does not expressly address but importantly does not dispute that a remand may also be in order if this Court reverses the Ninth Circuit in *Recio*, so long as this Court holds that an inchoate offense such as conspiracy requires the government to prove that the facts, as the defendant understood them, constituted a crime. Indeed, at oral argument before this Court in *Recio*, the government suggested that was the correct rule. *E.g.*, 01-1184 Trans. 13 ("the question of conspiracy liability is judged by what the actor perceives to be the facts").

In this case, petitioners were charged not merely with "conspiring to steal a trade secret and attempting to receive a trade secret" (Br. for U.S. 2) but specifically with committing those inchoate offenses with respect to "a trade secret with a sufficient federal nexus – one that is 'related to or included in a product that is produced for or placed *in interstate or foreign commerce*'" (Pet. 2 (quoting 18 U.S.C. 1832(a)) (emphasis added)). That federal nexus is of course not a makeweight: it is an element of the crime, and it is furthermore the justification for federalizing an offense that has long been prosecuted by the states.

The Sixth Circuit in this case nonetheless affirmed petitioners' convictions on the ground that they purportedly knew the materials they received were "trade secrets," without regard to whether petitioners knew those materials were trade secrets relating to a product *in interstate commerce*. See Pet. App. 10a-11a ("The Yangs' conspiracy to steal the trade secrets in violation of § 1832(a)(5) was completed when, with the intent to steal the trade secrets, they agreed to meet with Lee in the hotel room and they took an overt act towards the completion of the crime, that is, when the Yangs went to the hotel room.").

The petition accordingly explained that,

> even if this Court reverses the Ninth Circuit in *Recio*, petitioners' convictions may be invalid, for the Sixth Circuit held that the government need only prove that petitioners believed that the "mock" patent application the government had manufactured was a trade secret, as opposed to a trade secret "in interstate commerce," the element on which federal jurisdiction rests in this case.

Pet. 8. In support, the petition relied on *United States* v. *Brantley*, 777 F.2d 159, 164 (CA4 1985), which held that a conspiracy conviction relating to an offense with an interstate commerce nexus is valid only if the defendants are aware of

that nexus. See Pet. 8.[1] Any other rule would permit the government literally to "manufacture" federal jurisdiction over an offense – a concern directly implicated by this case, in which the "mock" patent application that underlies petitioners' convictions was assembled for the purposes of the sting operation in this case. Pet. 3 (citing J.A. 1363).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari and the Brief of the United States, the case should be held pending this Court's decision in No. 01-1184, *United States* v. *Recio*, and then disposed of accordingly.

Respectfully submitted,

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[1] Other cases to like effect are *United States* v. *Coates*, 949 F.2d 104, 106 (CA4 1991), and *United States* v. *Archer*, 486 F.2d 670, 681-82 (CA2 1973).